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JAMES R. BROWNING,

SUPREME COURT OF THE UNITED STATES

NO. 4—OCTOBER TERM, 1959

JOHN BURCH McMORRAN, Superintendent of Public Works of the State of New York,

Appellant,

v.

TUSCARORA NATION OF INDIANS, also known as TUSCARORA INDIAN NATION,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF POWER AUTHORITY OF THE STATE OF NEW YORK

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This brief is filed pursuant to Rule 42(4) of the Revised Rules of this Court on behalf of Power Authority of the State of New York, a political subdivision of the State (New York State Public Authorities Law, Article V, Title 1, Section 1002) by its authorized law officer.

The Authority is interested because the appeal is from a judgment affecting land needed by the Authority for a power project which it is constructing as a licensee of the Federal Power Commission. Our purpose is to advise this Court of facts relevant to the question of mootness not stated in either the memorandum dated April 25, 1960 presented to this Court by appellant or in the letter dated April 26, 1960 sent to this Court by appellee. Such facts relate to events which in part occurred after the submission of such memorandum and letter.

Facts

The judgment of the Court of Appeals for the Second Circuit, a part of which is the subject of this appeal, did the following:

1. Declared that the Authority as a licensee of the Federal Power Commission is authorized to condemn appellee's land needed for the Niagara Power Project pursuant to Section 21 of the Federal Power Act in either state or federal courts.

2. Declared that appellant's action in taking steps to acquire appellee's land in the name of the State of New York at the request and sole expense of and on behalf of the Authority as such licensee by the appropriation method of procedure pursuant to Section 1007 of the New York Public Authorities Law and Section 30 of the New York Highway Law did not conform to the requirements of Section 21 of the Federal Power Act.

3. Declared that in the absence of affirmative federal authorization the state lacks power to acquire Indian land because Sections 177 and 233 of Title 25 of the United States Code forbid its doing so.

4. Vacated and annulled the proceedings taken by appellant to appropriate the property.

Appellant appealed from the judgment except insofar as it declared that the Authority has a right to condemn appellee's land pursuant to Section 21 of the Federal Power Act.

The Authority made no attempt to obtain a review of the part of the judgment unfavorable to it but on the contrary immediately started an action to condemn appellee's land needed for its power project in the United States District Court for the Western District of New York. That action is pending and pursuant to an order of the District Court the Authority has obtained possession of the land and is carrying on construction activities on it.

Section 1007 (10) of the New York Public Authorities Law authorizes the Authority to make conveyance by quitclaim deed in the name of the state of property acquired by appropriation on its behalf when it deems it to be in the best interests of itself and the state to do so. Pursuant to such authorization, the Authority by an instrument dated April 26, 1960 quitclaimed to appellee whatever right, title and interest the state acquired in the appropriation proceedings. The stated consideration is appellee's agreement not to sue the state in the New York Court of Claims for damages growing out of the appropriation, such consideration to be evidenced by appellee's acceptance of the instrument. Such instrument was delivered to appellee's counsel and accepted by him on its behalf.

Suggestion of Mootness

We are cognizant that it is important to the state for this court to determine the question of the state's right to acquire Indian land within its borders for public purposes as it has been doing for 150 years. In fact, we understand that the state's reconstruction of a highway through the St. Regis Reservation in St. Lawrence County is presently blocked by some residents of the reservation upon the claim that the state has no right to exercise eminent domain over the necessary land. We submit, however, that the instant appeal is moot and that the question of the state's power of eminent domain over Indian land should be determined by this court in a different proceeding.

We respectfully suggest that the judgment below to the extent that it was appealed from be set aside on the ground of mootness.

Respectfully submitted,

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Dated: May 3, 1960